October 5, 2015

Robert Biggerstaff
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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Ex Parte* Letter Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

On this date, I have presented this letter to the persons identified on the distribution list below.

The pending petition[1] of Edison Electric Institute ("EEI") as modified by EEI's June 9, 2015 letter, should be denied.

In its September 30, 2015 *ex parte* filing, EEI claims that consumer groups such as NCLC argue that consumer "should not receive" various notifications of pending events related to their power service. This is a false dichotomy. The issue is not a Hobson's choice of receiving notice versus no notice—it is between a robot message and a live person. The offense lies in the medium, not the message. EEI can *always* make its calls with a live human being rather than a robot. Indeed, EEI needs no dispensation of the Commission to make any non-telemarketing calls with live human beings.

As the Court made abundantly clear in *Kovacs v. Cooper*, a speaker is not entitled to the cheapest method of distributing its messages. "That more people may be more easily and cheaply reached by [robocalls or text messages], is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when other easy means of [calling] are open."[2] The comments on this docket make abundantly clear that people are sick of robocalls—all robocalls—and our government has responded to that appropriately by strictly limiting such automated calling devices. More exemptions and loopholes are not what consumers want.

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[1] Petition for Expedited Declaratory Ruling of Edison Electric Institute and American Gas Association, CG Docket No. 02-278 (filed Feb. 12, 2015); Letter from Scott Blake Harris, Counsel, EEI, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed June 9, 2015) ("EEI June 9 Letter").

[2] *Kovacs v. Cooper*, 336 U. S. 77, 89 (1949) (emphasis added).

In addition, to the extent the exemptions sought by EEI (and others) are beyond the existing "emergency" exemption in the TCPA and Commission rules, they are facially content-based exemptions. The law of content-based restrictions on speech has seen important decisions recently, in particular the Court's recent decision in *Reed v. Town of Gilbert*[3] that strengthened the application of strict scrutiny to such restrictions (and exemptions) on speech.

A few weeks ago the Fourth Circuit, following *Reed*, invalidated South Carolina's robocall statute in *Cahaly v. Larosa*[4] because it excepted certain calls based on content; it permitted debt collection and survey robocalls without consent while prohibiting political robocalls without consent. Many of the exceptions sought by EEI and other petitioners on this docket clearly must fail under the same analysis.

As for notices of electric service termination, I am aware in many jurisdictions that multiple contacts far beyond a mere telephone call are required before terminating electric service—from a personal visit to the home, a hang-tag on the door, a notice affixed to the doorframe, certified mail, etc.[5] If it is truly such important information, then a robocall is certainly not the proper way to deliver it. In an emergency, robocalls allow a large number of calls to be made in a very short period of time since such an emergency may impact tens or hundreds of thousands of users immediately. I doubt that EEI or any other electric provider suddenly becomes aware on an urgent need to tell 100,0000 people their bill is overdue and must inform all 100,000 people of that fact in the next 10 minutes.

Automated calls by robots are a deeply flawed technology which is inappropriate for communicating critical information since they are easily fooled by answering machines and voicemail prompts.[6] The caller thinks their message was delivered, when in actuality a recording was played into the ether and not received by anyone because the robot mistakenly identified the voicemail greeting as a live person.

As noted earlier, the comments on this docket and in the press demonstrate the universal revulsion and contempt consumers have for robocalls. As a result the response of many

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[3] 135 S. Ct. 2218 (2015).

[4] No. 14-1680 (4th Cir. Aug. 6, 2015).

[5] EEI's reference to rules in Illinois that "expressly permit notification calls to be automated" misses the point. Plenty of state robocall rules permit robocalls for political purposes but that does not prevent the TCPA and Commission rules applying to calls "permitted" by state laws, as was demonstrated by the Commission's citations to Dialing Services, LLC and Democratic Dialing, and its 2014 enforcement advisory expressly aimed at political robocalls.

[6] I have over 30 years in computer and software systems involving computer telephony. I have become quite familiar in my career with various forms of answering machine detection ("AMD") and other call progress monitoring technologies and algorithms, and all are flawed, some significantly under-identify answering machines, sometimes by as much as 30% of calls. This is particularly true with modern voicemail systems as many AMD technologies still in use today were designed for old-school answering machines with cassette tapes.

consumers is an instant hang up whenever a robot call is detected—either by the sickening sound of a prerecorded voice or the dead air that indicates an autodialer was employed because the caller considers his time more valuable that the consumer's time.

If it is important that the consumer *actually receive* the information, then make the call with a live person, not a robot. Robot calls—including those related to electric service—should be reserved only for the most emergent of situations where the volume of calls coupled with the urgency of notice can only be physically accomplished via automated calls and messages.

Normal course of business calls that can be scheduled in advance must not be green-lighted for robots to make. It seems unlikely that there could be a sudden surge of users about to have service terminated that demands thousands of robocalls be placed in a short period of time. Likewise the anticipated quantity of calls to "notify consumers they may be eligible for subsidized or low-cost service due to age, income, or disability" seems to be easily planned for as a regular course of business. Notices of the eponymous "planed" service outage seem particularly undeserving of robocall treatment. The sum of these exemptions and others being sought would largely (and inappropriately) reanimate an EBR exemption for robot calls.

Parsing the language in EEI's filings leads to the inescapable conclusion that the bulk of "non-telemarketing" calls EEI wants to make are debt collection calls—albeit disguised as potential "service disconnection" notices.[7]

Thank you very much for your time considering my comments. Please note that pursuant to 47 C.F.R. §1.1206 a copy of this *ex parte* letter is being filed contemporaneously in the Commission's ECFS. I remain,

Sincerely

/s/ Robert Biggerstaff
Robert Biggerstaff

cc: Gigi Sohn (via gigi.sohn@fcc.gov)
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[7] EEI appears to eschew "post service termination" debt collection calls in its June 9, 2015 letter, but does not do so with respect to debt collection calls *prior* to terminating service.